IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 18

CITY OF DETROIT,
a Michigan Municipal Corporation, and
COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
Appellants,
vs.
THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation,
and
THE UNITED STATES OF AMERICA, Intervenor,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

(For List of Attorneys see inside front cover)

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AUTHORITIES CITED

Defendants and appellants, City of Detroit, a Michigan municipal corporation, and County of Wayne, a Michigan Constitutional Body Corporate, appeal from the judgment of the United States Court of Appeals for the Sixth Circuit, entered on June 16, 1956 affirming separate judgments rendered against them in behalf of plaintiff and appellee, The Murray Corporation of America, in the District Court for the Eastern District of Michigan, for sums totalling Sixty-seven Thousand Seven Hundred Fourteen and 96/100 ($67,714.96) Dollars against appellant City and Twelve Thousand Five Hundred Seventy-two and 66/100 ($12,572.66) Dollars against appellant County. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is involved.

(A) OPINION BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, appears in 234 F. 2nd 380. A copy of the Judgment and Opinion of the Court are attached hereto as Appendix A. The Opinion of Hon. Thomas P. Thornton, District Judge for the Eastern District of Michigan, is reported in 132 F. Supp. 899.

(B) JURISDICTION

(i) These suits were brought and original jurisdiction invoked by plaintiff and appellee, Murray, under 28 United States Code, Sections 1331 and 1332, respectively.

(ii) Two suits for recovery of the first and second half installments of the disputed City personal property tax together with a third action against the County of Wayne.

were consolidated and all disposed of together by judgment in the United States Court of Appeals, Sixth Circuit, on June 16, 1956 in Cause No. 12678. Notice of Appeal was filed in that Court in each of the three cases on July 25, 1956.[1]

(iii) Jurisdiction of the Supreme Court to review the latter judgment by direct appeal is conferred by C. 646, 62 Stat. 928 (28 U. S. C. A. 1254 (2)); C. 646, 62 Stat. 961; as amended by C. 139, §106, 63 Stat. 104 (28 U. S. C. A. 2101 (e)).

(iv) The following decisions sustain the jurisdiction of the Supreme Court to review said judgment on direct appeal in this case:

1. *Watson v. Employers Liability Assurance Corporation,* 348 U. S. 66, 99 L. Ed. 74.

In that appeal from affirmance of a judgment of dismissal of an action brought under the Louisiana direct action statute in the District Court, the Supreme Court's opinion acknowledged right of review there by appeal as appears at p. 70 U. S. (p. 80 L. Ed.):

> "Provisions of Louisiana's statutes having been held invalid as repugnant to the Federal Constitution, the case is properly here on appeal."

2. *Roth v. Delano,* 338 U. S. 226, 94 L. Ed. 13.

Jurisdiction there was taken by this Court to review by appeal the dismissal of a petition brought by the Attorney General of Michigan for right to escheat unclaimed dividends held by a national banking institution under liqui-

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[1] The issues raised being identical, this Jurisdictional Statement is intended to apply to all three cases in conformance with Rule 15 (3).

dation. As noted in the opinion, at p. 228 U. S. (p. 16 L. Ed.):

> "The Court of Appeals held the state statute ineffective as an unlawful interference with the liquidation of a national bank upon the same principles and authority fully discussed in our previous opinions."

3. *Kennedy v. Mason*, 334 U. S. 249, 92 L. Ed. 1347.

In that case as in the one here submitted, the Supreme Court had before it a controversy involving provisions in government war production contracts. Applicable here is the language noted at p. 256 U. S. (p. 1350 L. Ed.) of the opinion:

> "The short of the matter is that we have an extremely important question, probably affecting all cost-plus-fixed-fee war contractors and many of their employees immediately and ultimately affecting by a vast sum the cost of fighting the war."

4. *Longest v. Langford*, 274 U. S. 499, 71 L. Ed. 1170.

There the distinction between review on writs of error or by petition for certiorari was noted at p. 500 U. S. (p. 1171 L. Ed.). The opinion states that the distinction is important and serves a real purpose.

(v) Statutes Involved

(v) Statutory provisions connected with the issues are referred to below. Being too lengthy to set forth here in full, the pertinent text appears in Appendix B attached

Armed Services Procurement Act of 1947, Public Law of 80th Congress, C. 65 §2, 62 Stat. 21 *et seq.*, as amended, 41 U. S. C. A. Sec. 151 *et*

R. S. 3648, 31 U. S. C. A. 529;
C. 288, Title III, §305, 63 Stat. 396, as amended, 41 U. S. C. A. Sec. 255;
Procurement Regulations, 12 F. R. 7693;
Sec. 211.1 C. L. Mich. 1948;
Sec. 1, Chapter IV, Title VI, Charter of City of Detroit;
Sec. 26, Chapter IV, Title VI, Charter of City of Detroit.

(C) QUESTIONS PRESENTED.

The following questions are presented by this appeal:

1. Did United States contract procurement officers have authority under Federal law to provide for transfer of title to the United States of materials in the possession of appellee (an independent sub-contractor under Federal government prime contracts) upon appellee's receipt of partial payment therefor from its prime contractors, thereby causing invalidation of state and local taxing statutes and non-discriminatory ad valorem personal property taxes[2] levied thereunder against appellee upon such materials as repugnant to the implied constitutional immunity of the United States?

2. If inclusion of transfer of title provisions in sub-contracts under Federal contracts was authorized by Fed-

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[2] This case is novel in that the Supreme Court has never passed on the validity of an ad valorem personal property tax against private parties having in their possession personal property, title to which is purported to be in the United States.

eral statutes,—were the undisputed facts and course of conduct between the contracting parties nevertheless inconsistent with claim of absolute title in the government to materials acquired for processing by appellee, creating instead paper title for security purposes which would not invalidate state and local statutes or non-discriminatory ad valorem personal property taxes levied thereunder as repugnant to the implied constitutional immunity of the Federal governemnt?

3. If inclusion of such partial payment-title passage provisions was authorized by Federal statutes and vested absolute and not paper or security title to such materials in the Federal government,—then were state and local statutes and non-discriminatory ad valorem taxes levied thereunder (the incidence of which was not against the government and for which appellee alone is liable for paymen and collection) nevertheless valid as imposing no direct burden upon the Federal government in violation of its implied constitutional immunity?

(D) STATEMENT OF THE CASE

The matter here presented involves an appeal of three consolidated causes brought by plaintiff-appellee to recover personal property ad valorem taxes levied by defendants-appellants based on a common assessment as of January 1, 1952 upon personal property in appellee's possession in its plant at Detroit, Michigan, procured and being processed for parts and components of aircraft and

aircraft engines to be delivered to Kaiser Manufacturing Company and to Curtiss-Wright Corporation, respectively. The latter were prime contractors with the United States Air Force and were engaged in the manufacture of airplanes for the United States Air Force.[3]

Subsequent to the execution of the respective letter sub-contracts, the prime letter contracts were amended to provide for inclusion of partial payment provisions in appellee's sub-contracts, together with the clause in controversy here that upon the making of any such partial payment, title to all parts, materials, inventories, work in progress and non-durable tools, theretofore or thereafter acquired or produced for the performance of such contract shall forthwith vest in the Government.

Despite right to approve provisions incorporated into these sub-contracts, each separate document contained a disclaimer of obligation on the part of the Government to the sub-contractor.

Pursuant to the Charter of the City of Detroit, Title VI, Chapter IV, Section 1, the assessment in question was

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[3] Appellee's sub-contract with Kaiser consisted of a letter of intent executed March 28, 1951 for the manufacture of certain parts and sub-assemblies therein specified, amended Aug. 15, 1951 and again on Oct. 4, 1951, under Kaiser's letter Prime Contract No. AF 33(038)-18481 with the United States Government entered into Dec. 20, 1950 and subsequently amended.

Appellee's other sub-contract with Wright was likewise a letter of intent executed April 19, 1951 for the manufacture of certain parts and sub-assemblies therein specified, amended on May 24, 1951, under Wright's Prime Contract No. AF 33(038)-18132 with the United States Government entered into Dec. 12, 1950 and subsequently amended.

The letter prime contract between Wright and the latter referred to a so-called Basic Agreement No. 1 and made it a part of the contract between them. Superseding definitive sub-contracts and prime contracts were not agreed upon nor made effective until after the assessment date here in question.

made against appellee Murray as the person in possession of the subject property. This is illustrated by Appellants' Ex. 3, consisting of a portion of the City personal property assessment roll. On the line applicable to said property, the Murray Corporation was named as taxpayer and there also appeared the notation "assessed. subject to prior rights of Federal Government."

The agreed upon dollar valuation of personal property so assessed on January 1, 1952 is $2,043,670.00. The claim of appellee against appellant City is in the total sum of $67,714.96 and against appellant County in the sum of $12,572.66 for the tax year 1952, exclusive of interest from the date same was paid under protest prior to commencement of the several actions herein.

The United States petitioned for leave, and was allowed to intervene, claiming ownership of the property on which the assessment was based and an interest in the litigation.

Prior to hearing of appellee's motion for summary judgment depositions were taken at appellants' request, records of appellee Murray were examined and stipulations prepared, executed and filed to the end that the matter could be submitted to the District Judge upon undisputed facts for his determination as a matter of law based upon the pleadings, stipulations, depositions and exhibits.[4]

Judgment for plaintiff-appellee in each of the cases was entered on June 29, 1955, pursuant to an opinion filed by the District Judge.

Following oral argument on appeal taken, judgment of the Court of Appeals, Sixth Circuit, was entered on June 16, 1956 based on its opinion affirming the judgments of

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[4] The printed record in the Court of Appeals was in the form of a Joint Appendix.

the District Court in the three cases. Notice of Appeal was filed in each instance with the Court of Appeals, Sixth Circuit, on July 25, 1956.

(E) THE QUESTIONS ARE SUBSTANTIAL

1. Pending Litigation

The issues involved in this case are similar to litigation in other jurisdictions from coast to coast contesting validity of local taxes on the ground that title to the subject personal propery had been transferred to the United States before delivery.

The agreed dollar valuation of Murray Corporation's personal property so assessed on January 1, 1952 was $2,043,670 and judgments against appellant City total $67,714.96 and against appellant County $12,572.66, respectively. In addition, appellee has other similar actions pending in the District Court for 1953 and 1954.

Likewise 3 other Detroit taxpayers represented by appellee's counsel herein have a total of 5 cases pending in said Court and 9 others have a total of 25 cases involving the same or similar legal issues, now pending in the Wayne County Circuit Court against appellant City awaiting ultimate determination of this appeal with perhaps half that number brought against appellant County.

The overall amounts affecting appellants, City and County, total $3,834,524.06[5] for the years 1952 through 1956. New cases are likely to be filed annually so long as contracts continue to be let by the Government with the partial payment-title passage clauses here in question.

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[5] This includes taxes which the City Treasurer receives as collection agent for the Detroit Board of Education.

2. Effect on United States and Local Communities

As important as the large sums presently involved in the many States where these contests are pending is the future effect of construction by the Court of Appeals below of the Armed Services Procurement Act of 1947, upholding provisions in procurement contracts whereby the Government purports to take title directly to material in the course of being manufactured by independent sub-contractors. Equally substantial is the impact of its decision that actual, beneficial title was intended to pass to the Government before delivery of the supplies contracted for by the prime contractor. Such extension of the doctrine of implied constitutional immunity to private independent contractors by the Court below nullifies local tax laws and ignores the protection afforded the government by the careful manner in which the assessment herein was made.

Important public interest, national and local, therefore suggests that this matter should be heard, considered and decided on the merits by this Court.

Reflecting the concern felt by the Government regarding the questions being raised, the following view was expressed in the Brief and Appendix (p. 34) filed in the District Court below by the United States:

> "Also, as the Court knows from statements made at the oral argument, recently the Government has been presented with the same basic problem in other jurisdictions. The number of contracts, as well as the amounts involved, is substantially greater than here. No doubt, some of the same arguments will be advanced. Until an authoritative decision has been rendered by a federal court on which is, essentially, a federal question, the problem remains a fairly critical one to the Government and its procuring agencies."

Similar concern was indicated by appellee Murray Corporation by its opening statement in its main brief filed in the District Court:

> "This case is of national importance."

The District Court in this case pointed out (132 F. (2d) 899, at 900):

> "The Court is not unmindful of the effects of its decision in this matter. The Court has been advised that there are many actions in this geographical area that have been commenced, or are about to be commenced, involving the issue which we are here called upon to resolve, and that the aggregate of taxes involved may well be in the neighborhood of two million dollars."

Representatives of the United States Air Force stated that—

> "partial payment clauses with provisions vesting the title in the United States have been included in upwards of 80% of fixed price prime and subcontracts for the production of aircraft for the United States, by contract, and in substantially a greater percentage of contracts, dollarwise." (Stipulation No. 2, Paragraph (2); Joint Appendix (86)).

The possible nation-wide value of materials in the hands of private contractors doing Federal contract work immunized from personal property taxation by virtue of partial payment-title transfer clauses in such contracts was estimated by the United States Bureau of the Budget as approximately $4,900,000,000 as of June 30, 1953. This appears in report of "Hearings before Sub-Committee on Legislative Program of the Committee on Government Operations," United States Senate—83rd Congress—2nd Session, June 2 and 3, 1954 (pp. 42-53). The resulting tax loss de-

pends, of course, on the assessment percentages and rates in each taxing district and any fluctuation in amount of such materials in the hands of contractors each year on the various local tax dates.

In many States and communities no personal property taxes are assessed, but some form or forms of privilege or specific taxes are usually substituted in their place, which types of taxes have been held valid by this Court when the responsibility for their payment is directly on the contractor and not on the governemnt.

The Commission on Inter-Governmental Relations appointed by the President, upon authority conferred by federal act has recognized the increase in Federal holdings of real and personal property including personalty[6] in the hands of private contractors, claimed immune as in the case herein by virtue of title passing provisions, with its consequent serious effect on local taxation and has noted that the greatest increase has been in urban areas.

Need exists for full as well as final decision whether such non-discriminatory personal property ad valorem taxes may be levied against appellee Murray Corporation on inventory acquired and being processed as a sub-contractor for eventual delivery to prime contractors and by the latter to the United States Air Force under separate prime contracts.

Until this Court ultimately determines the questions of authority for inclusion of said provisions in these sub-contracts, together with their proper construction and effect on local tax laws uncertainty continues in the national scene as well as at local levels of government.

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[6] Hearings before the Committee on Government operations, United States Senate, 84th Congress, 1st Session, July 25, 1955, Appendix II (p. 209).

3. Important Issues Left Unanswered by Lower Court

The error of the United States Court of Appeals in invalidating the State statute herein consists chiefly of failure to examine the facts and circumstances of the present case together with the rights and obligations of appellee under its sub-contract as the Supreme Court has done in *New Brunswick v. United States*, 276 U. S. 547; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Graves v. New York*, 306 U. S. 466; *Alabama v. King & Boozer*, 314 U. S. 1; *Oklahoma State Tax Comm. v. Texas Co.*, 336 U. S. 342.

Overlooked by the opinion of the Court of Appeals are certain facts and an admitted course of conduct urged by appellants as grounds for their contention—that the provisions for taking of title were for security purposes only, a mere paper title. (*Offutt Housing Corp. v. Sarpy County*, 351 U. S. 253, 261.) Nor was cognizance taken of appellants' contention that a non-discriminatory personal property tax against an independent contractor "assessed subject to prior rights of the Federal Government" and collectible as a debt against such contractor is valid in that no direct burden is laid upon the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of government. Passed over also was the mode of assessment followed here within the rule laid down by this Court in such cases as *S. R. A. v. Minnesota*, 327 U. S. 558 and *New Brunswick v. United States*, 276 U. S. 547, 556.

Neither did said Court consider the effect of the finality of State Court decisions on whether responsibility for payment of the taxes in question fell solely on appellee and not the Government. *Alabama v. King & Boozer, supra; Kern-Limerick v. Scurlock*, 347 U. S. 110, 121.

4. Reappraisal Urged of Constitutional Immunity Doctrine

The mere finding that this is an ad valorem property tax on personal property of the government in the hands of a private party is not just cause for nullifying it, as the Court below did on the authority of *United States v. Allegheny County*, 322 U. S. 174.

We urge upon the Court the desirability—perhaps the necessity—of now reappraising its decision in *Allegheny supra*, if it may not be distinguished—with such help as counsel herein are able to provide in briefs on the merits and in oral argument, to determine whether it is in conflict with and unsustainable under the theory of "incidence" or "direct burden" of a tax under the constitutional immunity doctrine as firmly established by such decisions as: *James v. Dravo*, 302 U. S. 134, 114 A. L. R. 318; *Helvering v. Mountain Producers*, 303 U. S. 376; *Graves v. New York*, 306 U. S. 466; *Alabama v. King & Boozer*, 314 U. S. 1; *Esso Standard Oil Co. v. Evans*, 345 U. S. 495; *New Brunswick v. United States, supra;* and *S. R. A. v. Minnesota, supra;* and others.

Under the facts and circumstances presented by this appeal these decisions of this Court wherein the true principle of "incidence of the tax" has been enunciated are, we maintain, pertinent.

We respectfully suggest that the entire subject of constitutional immunity can be clarified and rendered possible for future consistent use by this and inferior courts by proper application of the rule laid down by Chief Justice Marshall in *McCullough v. Maryland*, 4 Wheat. 579 at p. 609, to any and all types of taxes (ad valorem as well as specific) namely:

If the tax "*retards, impedes, burdens, or in any manner controls the operations of * * * the powers vested * * * in the general government*" then it is bad. If not it is good.

In this spirit it was suggested to the Supreme Court in the *Draco* case, *supra*, that it restrict the rule of tax exemption so that a private person who sells to or contracts with the Government cannot claim the immunity against taxation which properly belongs to the sovereign alone. (See *Amicus Curiae*—Brief of Solicitor General and Attorney General, pp. 2-3, *James v. Draco, supra*). It is our contention that to uphold such restriction here would fit within Chief Justice Marshall's rule or theory of the doctrine of implied constitutional immunity and logically validate the tax laws and taxes here involved.[7]

The fact that this Court has been divided in its opinions in most governmental immunity cases from *Draco, supra*, to the most recent case of *Offutt Housing Corp. v. Sarpy County*, 351 U. S. 253, is eloquent testimony to the need for reestablishment of a sound and universally applicable interpretation of the immunity doctrine which will clarify the matter both for the Government, the contractors concerned and local taxing bodies.

It is our contention, which we would like to develop more fully in briefs and argument at the earliest opportunity convenient to the Court, that these non-discriminatory taxes

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[7] Chief Justice Marshall was attempting to resolve a conflict between the Federal government and a State, involving the whole philosophy of State v. Federal power. Before him was the studied and deliberate attempt by a State to destroy a Federal instrumentality by the levy of a discriminatory "political" tax leveled exclusively at the branch of the United States bank established in Maryland. (Argument of Pinckney in *McCullough*, 4 Wheat. p. 598.)

It is noteworthy that the Chief Justice was careful to except from the effect of his opinion in McCullough non-discriminatory taxes (property taxes included) 4 Wheat. 609. We contend and would like the opportunity to present our views that a true interpretation of that opinion with such exception must logically, legally and equitably lead to the inevitable conclusion that the tax laws and taxes now before this Court should be validated.

here involved, assessed against a private corporation for the payment of which such corporation is solely responsible, and which place no burden upon the government, except such as the government may have assumed by its contracts with the taxpayer (appellee), are and should be equally as valid as the taxes involved in *Dravo, King-Boozer, New Brunswick, S. R. A. etc., supra.* We believe accordingly that the Federal questions presented by this appeal are substantial, that they are of great public importance and should be considered by this Court on briefs and with oral argument on their merits.

Respectfully submitted,

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September 6, 1956.

APPENDIX A

JUDGMENT AND OPINION OF COURT OF APPEALS

CAUSE ARGUED AND SUBMITTED

June 4, 1956

(Before Allen and Martin, Circuit Judges, and Starr, District Judge.)

This cause is argued by Thomas J. Foley for County of Wayne, by Julius Pliskow for The City of Detroit, appellants; by Victor Klein for The Murray Corporation, and Lyle M. Turner for The United States, appellees, and is submitted to the court.

JUDGMENT

Entered June 16, 1956.

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the several judgments of the said District Court in this cause be and the same are hereby affirmed.

OPINION.

(Filed June 16, 1956)

Decided June 16, 1956.

Before ALLEN and MARTIN, Circuit Judges, and STARR, District Judge.

MARTIN, Circuit Judge. In three separate actions consolidated on this appeal, brought by The Murray Corporation of America in which the United States of America intervened, the District Court awarded summary judgments in favor of the plaintiff in the total amount of $76,748.47 against the City of Detroit covering personal property taxes illegally collected in two installments for the year 1952 and for $14,116.30 against the County of Wayne, Michigan, for personal property tax illegally collected.

The intervention of the United States was permitted for the reason that the Government claimed ownership of the personal property upon which the tax assessments were made by the City and the County respectively. Concededly, no genuine issue on any material fact was presented, and therefore summary judgment was the proper proceeding for disposition of the issues of law involved.

The assessment of more than $2,000,000.00 in controversy was made against The Murray Corporation of America on personal property in its possession under two letter sub-contracts respectively with "Kaiser" Corporation and "Wright" Corporation, each under and pursuant to letter prime contracts between the United States Government and Kaiser and Wright corporations respectively. These letter sub-contracts covered the manufacture of specified parts and assemblies required under the prime contracts for the United States Air Force for the national defense. These sub-contracts and amendments

thereto were approved by a contracting officer of the United States Air Force in accordance with the requirements of the prime contract.

Included in these letter sub-contracts, by amendment, was a partial payment clause which, as stated by the District Judge, presents the nub of the present controversy. This clause in substance provided that upon the making of any partial payment, title to all parts, materials, inventories, work in process, and non-durable tools theretofore acquired or produced by the contractor for the performance of the contract and properly chargeable to the contract under sound accounting practices should *forthwith vest in the Government;* and title to all like property thereafter acquired or produced by the contractor for performance of the contract and properly chargeable as aforementioned should vest in the Government forthwith upon such acquisition or production.

The assessment date under Michigan law with which we are concerned was January 1, 1952. During 1951, the Murray Corporation upon its several requests, audited and approved by a contracting officer of the United States Air Force, received partial payments from Kaiser of more than $163,000.00 and from Curtiss-Wright (successor to Wright Aeronautical Corporation) of more than $510,000.00.

In his clear-cut opinion, District Judge Thornton analyzed the respective positions of the contending parties. The important points made by Murray were that the taxes assessed were ad valorem taxes upon property and not privilege taxes assessed against the taxpayer; that property owned by the federal Government is immune from local ad valorem property taxes; that a federal question is presented for determination under federal and not under state law; that the partial payment clauses

vesting title in the federal Government were fully authorized and effective; that under the partial payment clauses title to the property in question was vested in the United States on the assessment date, and that this is an *absolute* and not a bare lien or security title; that Murray is the real party in interest and so entitled to bring the actions; and that the equitable arguments advanced by the City and County have been entirely rejected by the Supreme Court of the United States.

The United States took substantially the same position and contends that the assessment was upon its property and therefore invalid under the federal Constitution.

The position of the City of Detroit was in effect that the partial payment and transfer of title clause was not authorized nor in conformity with federal statutes; that the inclusion of the clause would not defeat an ad valorem tax on personal property in the hands of an independent sub-contractor acquired in the course of carrying out the provisions of a sub-contract for defense production; and that the course of action and dealing with the property was inconsistent with the vesting of absolute title in the United States and the Government therefore acquired merely a lien or title for security purposes leaving Murray vested with an equitable title to the personal property subject to an ad valorem property tax.

The County of Wayne took the same position assumed by the City of Detroit with the added contention, which is clearly not meritorious, that the Murray Corporation is not the real party in interest.

We agree with the finding of the District Court that the partial payment clauses are not invalid for want of authority or for non-conformity with the federal statutes. We concur also in the conclusion of the trial court that "a reading of the Partial Payment Clause leaves no doubt

that, upon the making of a partial payment, title to parts, materials, etc., acquired for the performance of the contract vests in the United States Government as does title to all property subsequently acquired for the performance of the contract."

Among the numerous decisions of the Supreme Court of the United States upon the question of the immunity of Government property from state taxation we think *United States v. County of Allegheny,* 322 U. S. 174, is controlling authority in the instant case. In our judgment, the facts of that case are not in any material aspect distinguishable from the facts encountered here. In the *Allegheny* case, the United States made a contract with a machine company in Pennsylvania for the manufacture of large field guns. The private corporation's plant though used for the manufacture of heavy machinery was not equipped for the manufacture of ordnance. It was agreed that certain additional machinery required for the work should be furnished at Government expense and should remain property of the United States. In performance of the agreement the contractor manufactured one machine, the Government furnished eight gunboring lathes and the rest of the needed equipment was purchased by the contractor from other machine tool manufacturers. The machinery bought or built by the manufacturer was inspected and accepted on behalf of the United States which compensated the contractor therefor. The contract provided that the title to all such property should vest in the Government upon delivery at the site of work and upon inspection and acceptance. The Government leased the equipment to the contractor during the period for which the guns were manufactured. The machinery was bolted on concrete foundations in the contractor's plant on real estate owned by it and could be

removed without damage to the building. The Supreme Court of Pennsylvania upheld the assessment by Allegheny County upon the ground that under the state law regardless of who held title to it, the machinery constituted a part of the contractor's mill for purposes of assessment and had been properly assessed as real estate. Both the contractor and the United States, which had intervened in the state litigation, appealed to the Supreme Court of the United States. That highest tribunal held that the substance of the procedure by the state assessors was to lay an ad valorem general property tax on property owned by the United States and that the Government-owned property, to the full extent of its interests therein, is immune from taxation, either as against the Government itself or as against one holding the property as bailee. The judgment of the state supreme court was reversed as violative of the federal Constitution.

Upon analysis, we think that substantially all of the arguments advanced by appellant were rejected by the Supreme Court in the *Allegheny* case. The Supreme Court declared that the principle is unshaken, indeed rarely questioned, that "possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation." 322 U. S. 177.

In the earlier case of *United States v. Ansonia Brass & Copper Company*, 218 U. S. 452, the Supreme Court had held that vessels in course of construction for the United States, the title to which under the contract vests in the Government as fast as constructed, become instrumentalities of the Government and for reasons of public policy cannot be seized under state laws to answer private claims. In the later case of *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110, the Supreme Court distinguished

Alabama v. King & Boozer, 314 U. S. 1, upon the ground that under the contract involved in the *Kern-Limerick* case the United States was the real purchaser. The Arkansas gross receipts tax law was held unconstitutional as applied to transactions whereby private contractors procured in Arkansas two tractors for use in constructing a naval ammunition depot for the United States under a cost-plus-fixed-fee contract entered into with the Navy Department which provided that in procuring needed articles, the contractor should act as purchasing agent for the Government, title to the articles purchased should pass directly from the vendor to the Government and the Government should be directly responsible to the vendor for payment of the purchase price.

We think that reliance of the City of Detroit upon the following cited authorities is not well placed: *Esso Standard Oil Co. v. Evans*, 345 U. S. 495; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Graves v. New York*, 306 U. S. 466; and *Helvering v. Mountain Producers Corporation*, 303 U. S. 376. All of these cases involve excise or privilege taxes, where a privilege exercised by the contractor was taxed to him although the economic burden was passed along by him to the Government. The incidence of the privilege taxes was upon the contractor while in the case at bar an ad valorem property tax had been assessed upon property the title to which is vested in the United States and the incidence of the tax is directly and solely upon the property assessed.

In the *Esso Standard Oil Company* case the Government had *agreed* to assume liability of all estate taxes in connection with a storage contract made by it with a private corporation. The *Allegheny County* case was thus distinguished: "*Allegheny County*, however, was quite different. The United States had leased certain machinery to the Mesta Machine Company. In imposing

the state ad valorem property tax, Pennsylvania included in the Mesta assessment both the privately owned land and buildings, and the government machinery. . . . So the value of the federal property was, in part, the measure of the tax. We held the substance of this procedure was 'to lay an ad valorem general property tax on property owned by the United States.' . . . and therefore invalid. Our holding was not 'dependent upon the ultimate resting place of the economic burden of the tax.' . . .

"This tax was imposed because Esso stored gasoline. It is not, as the *Allegheny County* tax was, based on the worth of the government property. Instead, the amount collected is graduated in accordance with the exercise of Esso's privilege to engage in such operations; so it is not 'on' the federal property as was Pennsylvania's." 345 U. S. 499.

In our judgment *S. R. A., Inc. v. Minnesota*, 327 U. S. 558, is not apposite for the reason that in that case the contract involved transferred the equity in the land to the purchaser, leaving in the United States only a legal title as security, rendering it the equivalent of a mortgage. The opinion pointed out that no state has power to tax property of the United States against its will; and stated that "under an implied constitutional immunity, its property and operations must be exempt from state control in tax as in other matters." *M'Culloch v. Maryland*, 4 Wheaton 316, 425; *VanBrocklin v. Tennessee*, 117 U. S. 151, 177; and *United States v. Allegheny County*, 322 U. S. 174, 176-177; were cited.

The several judgments of the District Court from which the appeals were taken in the instant controversy are affirmed.

APPENDIX B

STATUTES, REGULATIONS, CHARTER PROVISIONS

Chapter 3—Procurement of Supplies and Services by Armed Services—C65, 62 Stat. 21, et seq., 41 U. S. C. A. 151 et seq.

§151. PURCHASES and contracts for supplies and services—(a) Applicability to all Armed Services.

The provisions of this chapter shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.

* * * * * *

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

* * * * * *

(10) for supplies or services for which it is impracticable to secure competition;

* * * * *

§153.

Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151 (c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 151(c) of this title shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(c) All contracts negotiated without advertising pursuant to an authority contained in this chapter shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Feb. 19, 1948, c. 65, §4, 62 Stat. 23; Oct 31, 1951, c. 652, 65 Stat. 700.

§154.

(a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: PROVIDED, That advance payments shall be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provision for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree. Feb. 19, 1948, c. 65, §5; 62 Stat. 24.

31 U. S. C. A. 529; R. S. §3648; Aug. 2, 1946, c. 744, 60 Stat. 809

§529. ADVANCES OF PUBLIC MONEYS; PROHIBITION AGAINST

No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of

their respective duties, and to the fulfillment of the public engagements. The President may also direct such advances as he may deem necessary and proper, to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected.

41 U. S. C. A. 255. (June 30, 1949, c. 288, Title III, §305, 63 Stat. 396)

§255. ADVANCE PAYMENTS ON NEGOTIATED CONTRACTS; GOVERNING TERMS

(a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: Provided, That advance payments shall be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provision for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree.

(APR 5—407.2(1))

"Partial Payments—Partial payments, which are hereby defined as payments prior to acceptance on work in progress for the Government under this contract, may be made upon the following terms and conditions.

"(a) The Contracting Officer may, from time to time authorize partial payments to the Contractor upon property acquired or produced by it for the performance of this contract: Provided, that such partial payments shall not exceed 90 percent of the cost to the Contractor of the Property upon which payment is made, which cost shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer: Provided further, that in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated advance payments, if any, made under this contract exceed 80 percent of the total amount authorized to be expended under paragraph 5 of this Letter Contract.

"(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production; Provided, that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder, or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

"(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

"(d) It is recognized that property (including, without limitation completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts, and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Clause will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Clause, upon terms approved by the Contracting Officer, provided, that after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination clause of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the Contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination clause of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies

delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Clause shall vest in the Contractor.

"(e) The provisions of this contract referring to 'Liability for Government-furnished Property' and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Clause. The provisions of this Clause shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

"(f) If this contract (as heretofore or hereafter supplemented or amended) contains provisions for Advance Payments and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments clause any unliquidated balance of advance payments is outstanding, then notwithstanding any other provisions of the Advance Payments Clause of this contract the net amount, after appropriate deduction for liquidation of the advance payment of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Clause, and shall thereafter be withdrawn only pursuant to such provisions."

Compiled Laws of Michigan 1948, 211.1 (7.1 MSA)

"Property subject to taxation. Section 1. *The People of the State of Michigan enact,* That all property, real and Personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

Section 1, Chapter IV, Title VI, Charter of the City of Detroit, 1918 (1592 Ed.)

"* * * The owners or persons in possession of any personal property shall pay all taxes assessed thereon."

Section 26, Chapter IV, Title VI, City Charter, 1918 (1952 Ed.)

"On and after the 26th day of August in each year and at any time until the taxes mentioned herein are paid, the City Treasurer shall enforce the collection of all unpaid taxes which are assessed against the property or value other than real estate. If such taxes shall remain unpaid the City Treasurer shall forthwith levy upon and sell at public auction the personal property of any person refusing or neglecting to pay such tax, or collect the same through the courts. Six days' notice of any such sale shall be given by the City Treasurer by publication in the official newspaper. Whenever such sale shall have been made the proceeds thereof shall be applied to the payment of the taxes and percentage and the expense of such sale, and any surplus remaining thereafter shall be paid over to the owner of such property or other person entitled to receive the same. The City Treasurer shall have power in the name of the City to prosecute any person or corporation refusing or neglecting to pay such taxes or any special assessment by a suit in the Circuit Court for the County of Wayne, and he shall have, use and take all lawful ways and means provided by law for the collection of debts to enforce the payment of any such tax or any special assessment. The tax rolls or unit cards after the tax has been transferred thereto shall be prima facie evidence of the indebtedness of such person and the regularity of the proceedings by which such tax or assessment was assessed and levied. All city taxes upon personal property shall become on said fifteenth day of July a lien thereon and so remain until paid and no transfer of the personal property assessed shall operate to divest or destroy such lien."